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48933-2012

RE ADM File No. 2009-04: Proposals Regarding Procedure for Disqualification of Supreme Court Justices

Dear Clerk Davis:

At its July 24, 2009 meeting, the Board of Commissioners of the State Bar discussed the issues raised in the Court's order publishing for comment proposals for the disqualification of Supreme Court Justices. Because the *Caperton v Massey* decision had been decided just prior to the Board's June meeting, the item was not included on the June agenda. Consequently, the July meeting was the Board's first discussion of the issues raised by the order. In preparation for the discussion, the Board was provided with the order, the *Caperton* decision, all published comments submitted to the Court, pertinent provisions of the Michigan and ABA model codes of judicial conduct, commentary and recommendations from four State Bar committees¹, the ABA model rule on disqualification, the 2008 ABA draft judicial disqualification project report, the 2008 report of the Brennan Center for Justice: "Fair Courts: Setting Recusal Standards," and the July 21, 2009 order in *United States Fidelity Insurance & Guaranty Company v. Michigan Catastrophic Claims Association, SC: 133466*.

While the Board made a conscientious effort to meet the order's August 1 deadline for comment, deliberating for several hours beyond its customary adjournment time, the Board concluded that a number of important issues required further deliberation and discussion. We are in the process of determining how best to provide timely and meaningful input on those issues prior to your September 2 administrative public hearing.

Rather than vote on the relative merits of the three proposals, the Board chose to offer its views on key questions. Although the Board's discussion revealed serious but respectful disagreement among the Commissioners on a number of the questions, all Commissioners agreed on the importance of the issue of judicial disqualification in

¹ The standing committees on Civil Procedure and Courts, Criminal Jurisprudence and Practice, Ethics, and the commissioner committee on Public Policy, Image and Identity.

general and there was repeated note made of the dangers of false solutions, particularly in the context of an elected court of last resort.

The issues on which a majority of the Board reached consensus during the July 24th meeting are the following:

1) The primary obligation to recognize the reason for disqualification should rest with the judge or Justice.

The Board unanimously agreed with the Ethics Committee that Michigan's disqualification rules should be clear that judges and Justices have a fundamental duty to recuse themselves if they cannot decide a case impartially, even if a party does not raise the issue. The ABA model rule makes this clear, as do two of the three proposals. MCR 2.003 does not. It should be emphasized that the Board's vote on this issue should not be construed as encompassing a position on how a disqualification rule interacts with the "duty to sit" or "rule of necessity," the former being generally understood in the literature on recusal to be subordinate to disqualification rules, and the latter to override disqualification rules when the rule of necessity applies.

2) Disqualification decisions should be in writing.

A majority of the Board agreed that disqualification decisions should be in writing.

3) Dissents to a Justice's recusal decision should be allowed.

The discussion acknowledged that such dissent holds the potential to undermine confidence in the judicial process, but there was consensus that under our state constitution a Justice's prerogative to speak to issues before the Court cannot be circumscribed by court rule.

4) Only a Justice or a party should be able to raise the issue of the Justice's disqualification.

A majority of the Board believed that Justices should not have the authority to move for or otherwise initiate another Justice's disqualification. During the course of the discussion it was noted that a judge or Justice who is aware of serious ethical violations concerning another judge or Justice may have reporting obligations under the rules of professional conduct.

5) A Justice's recusal decision should be reviewable.

By a narrow majority, the Board supported the reviewability of a Justice's recusal decision. Recognizing the potential for litigants' gamesmanship and obstruction associated with various methods of review, the Board deferred the question of the procedures for review for further discussion.

6) The standard for bias should be "actual."

The Board discussed the choice of the word "actual" as a modifier rather than "personal" as used in MCR 2.003 and the ABA model rule. The issue of bias and its appearance will likely be explicated further as the disqualification rules are deliberated more extensively.

- 7) **The criteria for disqualification of judges and Justices should not be limited to enumerated criteria.**

This position was adopted unanimously.

- 8) **The disqualification rules for judges and Justices should clearly state that disqualification is required if the judge or Justice cannot impartially decide a case.**

The Board unanimously supported this recommendation. This position should not be construed as encompassing a position on how a disqualification rule interacts with the “duty to sit” or “rule of necessity.”

- 9) **The grounds for disqualification of judges and Justices should encompass appearance of bias, based on an objective standard.**

The Board supported adding appearance of bias to the disqualification rule, based on an objective or reasonableness standard. A significant minority of the Board expressed concern that, even with an objective or reasonableness standard, adding this ground would encourage inappropriate disqualification motions.

- 10) **Bias concerning an attorney should be grounds for disqualification of a Justice.**

A majority of the Board favored adding this criterion as a ground for disqualification of a Justice, as in MCR 2.003 and the ABA model rule.

- 11) **A Justice’s previously presiding over the same case in another court should be grounds for disqualification.**

The Board unanimously supported adding this provision from the ABA model rule to disqualification rules for judges and Justices.

- 12) **The two-year limitation on disqualification based on a former professional association with a party’s lawyer should be retained in MCR 2.003 and applied to Justices.**

The Board preferred the two-year limitation over the model rule’s open-ended disqualification provision concerning a judge’s prior professional association with a party’s lawyer.

The Board deferred the following questions for further deliberation and discussion:

- 1) Whether the grounds for disqualification of Justices and judges should be the same.
- 2) What the procedures for review of a Justice’s recusal decision should be.
- 3) Whether a duty to sit should be included in the disqualification rule.
- 4) Whether a public statement by a Justice committing or appearing to commit to a particular result should be grounds for disqualification.
- 5) Whether a Justice’s former service in governmental employment that involves the Justice’s public, personal, substantial participation concerning the proceeding, or the Justice’s public expression of an opinion concerning the merits of the matters in controversy, should be grounds for disqualification.

We are pleased to participate in the discussion of this important matter and look forward to continuing dialogue as the Court moves forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet K. Welch". The signature is fluid and cursive, with the first name "Janet" being more prominent.

Janet K. Welch
Executive Director

cc: Anne M. Boomer, Administrative Counsel, Michigan Supreme Court